No. 93-1003

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

CAMERON W. SHARP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

THEODORE G. HESS
Colonel, U.S.M.C.

LAURA L. SCUDDER
Major, U.S.M.C.
Appellate Government Counsel
Appellate Government Division
NAMARA
Washington, D.C. 20374-1111

QUESTION PRESENTED

Whether the Confrontation Clause of the Sixth Amendment prohibits a trial in absentia when the accused is present for arraignment but absent for all portions of the trial.

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OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-17a, is reported at 38 M.J. 33. The opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 18a-25a, is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 27, 1993. The petition for a writ of certiorari was filed on December 23, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1992).

STATEMENT

Following a general court-martial at the Norfolk Naval Base at Norfolk, Virginia, petitioner was convicted of conspiracy to distribute cocaine, conspiracy to distribute a substance represented as cocaine, distribution of cocaine, and attempted distribution of cocaine, in violation of Articles 80, 81, and 112a of the Uniform Code of Military Justice, 10 U.S.C. 880, 881, and 912a. He was sentenced to confinement for 15 years, total forfeiture of pay and allowances, reduction to the lowest enlisted pay grade, a fine of $5,000 or two years' additional confinement if he should fail to pay the fine, and a dishonorable discharge. Pet. App. 1a-2a. The Navy-Marine Corps Court of Military Review affirmed the findings and sentence. *Id.* at 18a-25a. The Court of Military Appeals affirmed. *Id.* at 1a-17a.

1. Petitioner was arraigned on November 27, 1989. Following his arraignment, petitioner requested a continuance of his trial until January 4 or 5, 1990. The trial judge granted the request in open court, in petitioner's presence. Tr. 7. Petitioner was released from pretrial confinement on November 28, 1989. Although he was granted leave over the Christmas and New Year's holidays, he left his command without checking out on leave, and he did not return on January 2, 1990, when his leave expired. Pet. App. 20a. His pretrial agreement provided that petitioner would be permitted to go on Christmas leave between December 15, 1989, and January 2, 1990, and that trial would commence on or before January 4, 1990. AXs I, XI.

Petitioner was reported as an unauthorized absentee as of January 2, 1990. A search for him in the Norfolk area, at his leave address in Indiana, and at his off-base home proved fruitless. Tr. 10, 14-17; AXs II-VI.

When trial began on January 4, 1990, petitioner was not present. The trial judge found petitioner's absence to be voluntary, and held that he had therefore waived his right to be present. Tr. 19. The judge then granted defense counsel's motion for a continuance until January 31, 1990, to permit counsel additional time both to prepare for trial and to attempt to locate petitioner. Tr. 21. Petitioner was still absent when trial resumed on February 1, 1990, and the trial proceeded in his absence. Pet. App. 4a. Petitioner was convicted and sentenced in absentia.

2. The Navy-Marine Court of Military Review upheld petitioner's conviction, rejecting his claim that he had been improperly tried in absentia. Pet. App. 18a-25a. The court held that the evidence was sufficient to show that petitioner's absence from trial was knowing and voluntary, and that petitioner had offered nothing to suggest otherwise. *Id.* at 20a-21a.

3. The Court of Military Appeals affirmed. Pet. App. 1a-17a. The court noted that the rules governing trials in the military system, unlike the Federal Rules of Criminal Procedure, permit a defendant to be tried in his absence after he has been arraigned, if his absence from trial is voluntary. Pet. App. 4a-9a. The court distinguished this Court's recent decision in *Crosby* v. *United States*, 113 S. Ct. 748 (1993), which held that under Fed. R. Crim. P. 43, a defendant who was not present at the beginning of trial could not be tried in absentia. In the military system, the court noted, the governing rule (Rules for Courts-Martial 804(b)(1)) permits trial in absentia "when there is a voluntary absence after arraignment." Pet. App. 9a. The court further found that petitioner's absence from trial was voluntary. *Id.* at 10a.

ARGUMENT

Petitioner argues (Pet. 5-8) that the Confrontation Clause of the Sixth Amendment prohibits a trial in absentia unless the accused is present for the beginning of his trial. His challenge is based entirely on the Sixth Amendment; he does not question that the military rules permit a trial in absentia for defendants who voluntarily absent themselves after arraignment, nor does he argue that his absence was not voluntary.

1. Petitioner did not raise in the court of military review or the Court of Military Appeals any claim challenging the constitutionality of the military rule permitting trials in absentia. That claim is therefore not properly before this Court. See, *e.g.*, *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]") (quoting *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976)); *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987).

2. In any event, the constitutional claim that petitioner raises is without merit. Rule for Courts-Martial 804(b)(1) provides that an accused's presence is not required at his trial when he is voluntarily absent after arraignment.* Petitioner argues that the use of arraignment as the triggering event, after which there may be further proceedings in absentia, is contrary to this Court's decision in *Crosby* v. *United States*, 113 S. Ct. 748 (1993), and the Sixth Amendment right to confrontation. As this Court noted in *Crosby*, however, that decision was based on an interpretation of Fed. R. Crim. P. 43; the Court there held that the triggering event under

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* Arraignment consists of reading the charges and specifications and calling for pleas. Rules for Courts-Martial 904.

Rule 43 was the "commencement of trial," and that a trial in absentia in which the defendant was not present for the beginning of the trial would violate that rule. The Court did not address the question whether the Sixth Amendment required the same result. *Crosby*, 113 S. Ct. at 752-753. *Crosby* therefore does not aid petitioner.

Moreover, while the right of confrontation is fully recognized in the military criminal justice system, it does not derive from the Sixth Amendment, because the Sixth Amendment, by its terms, does not extend to court-martial proceedings. The Sixth Amendment applies to "criminal prosecutions," and it is well settled that court-martial proceedings are not "criminal prosecutions" for Sixth Amendment purposes. See *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950); *Ex parte Quirin*, 317 U.S. 1, 40 (1942); *Kahn* v. *Anderson*, 255 U.S. 1, 8 (1921). Instead, the constitutional provision that governs petitioner's claim is the Due Process Clause. And, as this Court has recently observed, due process principles must be applied with special caution where those principles are invoked in the military context. *Weiss* v. *United States*, No. 92-1482 (Jan. 19, 1994), slip op. 13-14; see also *Rostker* v. *Goldberg*, 453 U.S. 57, 67 (1981); *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976).

Trial in absentia, when an accused voluntarily fails to appear at trial following arraignment, has long been permitted in the military. See, *e.g.*, *United States* v. *Houghtaling*, 2 U.S.C.M.A. 230, 8 C.M.R. 30 (1953). The special need for such a rule in the military system may be explained by the fact that the military system has no provision for pretrial release on bond and thus has fewer means than most civilian systems for ensuring that the accused will appear for trial. The mobility of military personnel, and the fact that they often do not have close

ties to the community where they are temporarily stationed, may also make locating an absent defendant more difficult than in the typical civilian system and therefore call for a different due process analysis of the conduct of trials in absentia. In any event, even in the civilian system, neither the Sixth Amendment nor the Due Process Clause imposes a non-waivable requirement that the defendant be present for the commencement of his trial before he can be tried in absentia if he absconds thereafter.

To be sure, this Court has recognized a "constitutional right to presence" that is rooted in both the Confrontation Clause of the Sixth Amendment and the Due Process Clause. *United States* v. *Gagnon*, 470 U.S. 522, 526 (1985) (per curiam); *Illinois* v. *Allen*, 397 U.S. 337, 338 (1970). In *Snyder* v. *Massachusetts*, 291 U.S. 97, 105-106 (1934), the Court held that a criminal defendant has a right to be present at any trial proceeding for which "his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." In cases involving felony charges, this Court has described the right to be present at trial as "scarcely less important to the accused than the right of trial itself." *Diaz* v. *United States*, 223 U.S. 442, 455 (1912).

Like the right to a trial, however, the constitutional right to presence may be waived. In *Diaz*, the Court held that a defendant waived his right to be present during trial by expressly consenting to a continuation of the trial in his absence. 223 U.S. at 453-459. The Court began its analysis with the observation that the Sixth Amendment right of confrontation (like the Philippine statutory equivalent at issue in that case) "is in the nature of a privilege extended to the accused, rather than a restriction upon him * * * and that he is free to assert it or to waive it, as to him may seem advantageous." *Id.*

at 450. In *Taylor* v. *United States*, 414 U.S. 17, 19-20 (1973) (per curiam), the Court held that, even if the defendant has not given express consent to conducting the trial in his absence, "mere voluntary absence from * * * trial" may constitute an "effective[] waive[r]" of the right to be present. And in *Illinois* v. *Allen*, 397 U.S. 337, 343 (1970), the Court made clear that, even when a defendant insists on being present, he may be excluded from the courtroom if he behaves so disruptively as to prevent the trial from proceeding. Although this Court's decisions in *Diaz*, *Taylor*, and *Allen* did not involve a defendant who deliberately failed to appear even for the beginning of his trial, the reasoning of those decisions leads to the conclusion that a waiver of the right to be present may occur in that context.

The decisions in *Diaz*, *Taylor*, and *Allen* were based upon the principle that a criminal defendant should not be permitted to defeat a trial by his own misconduct. Thus, the *Diaz* Court, quoting from an earlier court of appeals decision, stated:

> The question is one of broad public policy, whether an accused person, placed upon trial for crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of [the] courts and juries and turn them into a solemn farce * * *. Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong. And yet this would be precisely what it would do if it permitted * * * an absconding from the jurisdiction while at large on bail, during the pendency of a trial before a jury, to operate as a shield.

223 U.S. at 458 (quoting *Falk* v. *United States*, 15 App. D.C. 446, 460-461 (1899), cert. denied, 181 U.S. 618 (1901)). In *Taylor*, the Court similarly reasoned that "the governmental prerogative to proceed with a trial may not be defeated by conduct of the accused that prevents the trial from going forward." 414 U.S. at 20 (quoting *Illinois* v. *Allen*, 397 U.S. at 349 (Brennan, J., concurring)). In *Allen*, the Court rejected the notion that a criminal defendant's right to be present extended so far as to "permit[] [the defendant] by his disruptive conduct indefinitely to avoid being tried on the charges brought against him." 397 U.S. at 346; see also *id.* at 345 (a court may imprison a disruptive defendant for contempt and discontinue the trial, but the court should "guard against allowing a defendant to profit from his own wrong" by "elect[ing] to spend a prolonged period in confinement for contempt in the hope that adverse witnesses might be unavailable after a lapse of time").

The principle that an accused should not, by his misconduct, be permitted to prevent a trial on the charges against him is directly applicable in the present context. A defendant has the duty both to appear for and remain present throughout trial. See 18 U.S.C. 3146; *Taylor*, 414 U.S. at 20 (citing *Stack* v. *Boyle*, 342 U.S. 1, 4-5 (1951)); see also Cohen, *Trial in Absentia Re-examined*, 40 Tenn. L. Rev. 155, 156 (1973) (distinguishing criminal defendant's "right of presence," which is "well-accepted," from a "right of absence," which is "generally unaccepted"). Requiring the court to order an open-ended postponement of trial would reward the defendant's misconduct by preventing a trial "until the accused person himself should be pleased to permit it." *Diaz*, 223 U.S. at 457 (quoting *Falk*, 15 App. D.C. at 454). This Court's decisions in *Diaz*, *Taylor*, and *Allen* make clear that the Constitution does not require that result.

In short, both the Sixth Amendment right to confrontation and the due process right to be present at trial are subject to waiver. The Confrontation Clause merely ensures that the defendant has the right to confront witnesses if he chooses; it does not require that he exercise that right. And the Due Process Clause protects the defendant's right to be present only to the extent of ensuring him a "full[l] * * * opportunity to defend against the charge[s]." *Gagnon*, 470 U.S. at 526 (quoting *Snyder* v. *Massachusetts*, 291 U.S. at 105-106). Due process is not offended when the defendant deliberately forgoes that opportunity. Accordingly, because neither the Sixth Amendment nor the Due Process Clause bars a defendant from waiving his right to be present for his trial, it follows *a fortiori* that due process principles, as applied in the military setting, do not incorporate any such prohibition on the waiver of the right to be present at court-martial proceedings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

THEODORE G. HESS
Colonel, U.S.M.C.

LAURA L. SCUDDER
Major, U.S.M.C.
Appellate Government Counsel
Appellate Government Division
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